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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

WHITNEY LAYTON,
Plaintiff in Error,
vs.
STATE OF MISSOURI,
Defendant in Error.

Error to the Supreme Court of Missouri.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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18094.

The Gunthorp-Warren Printing Company, 116-118 Randolph St., Chicago.

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STATEMENT OF FACTS.

The questions involved in this case arise under the Fourteenth Article of Amendment to the Constitution of the United States, and are presented by the contention of the plaintiff in error, Layton, that he is deprived of liberty and property without due process of law, by an act of the General Assembly of the State of Missouri, approved May 11, 1899, in force August 22, 1899, as follows (record, 674):

"Section 1. That it shall be unlawful for any person or corporation doing business in this state to manufacture, sell, or offer to sell, any article, compound or preparation, for the purpose of being used, or which is intended to be used, in the preparation of food, in which article, compound

or preparation there is any arsenic, calomel, bismuth, ammonia or alum.

"Section 2. Any person or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than $100, which shall be paid into and become part of the road fund of the county in which such fine is collected."

It appears from the record that plaintiff in error was charged, in an information filed by the prosecuting attorney in the St. Louis Court of Criminal Correction, with unlawfully manufacturing, selling and offering to sell, a certain baking powder, contrary to the statute aforesaid. (p. 2.)

On the trial, a plea of not guilty having been interposed, the prosecuting attorney introduced in evidence a stipulation executed by the attorneys for both the State and Layton, in which stipulation the plaintiff in error admitted that in the aity of St. Louis, on the 28th day of August, 1899, he did manufacture, sell, and offer to sell, to the J. M. Houston Grocer Company, a certain preparation known and designated as "Layton's Health Food Baking Powder," which was manufactured, sold and offered for sale for the purpose of being used, and was intended by the plaintiff in error, and the said J. M. Houston Grocer Company, to be used in the preparation of food; that in said preparation so manufactured, sold and offered to be sold by plaintiff in error, there was alum, and that the fact that the same contained alum was well known to the plaintiff in error. Upon introducing the stipulation, the state rested its case in chief. (pp. 8-9.)

Thereupon, a large mass of evidence was offered by the plaintiff in error, tending to prove that alum baking powder, so-called, was not deleterious to persons consuming the same in bread made with such baking powder; that baking powders have been in use for more than fifty years, and

are intended to furnish to the people a simple, cheap, efficient and wholesome leavening agent in the cooking of food, as a substitute for yeast. All baking powders furnish this leavening agent, in the form of carbon dioxide (carbonic acid gas), which is given off from the baking powder in preparing and cooking food. This gas, being liberated in the dough, forms bubbles, which take permanent form in the baked bread, thus making it light and porous. All baking powders, in their essential features, are the same, and all supply this leavening agent (dioxide of carbon) by freeing it from the bicarbonate of soda. They differ in the non-essential manner in which this carbon dioxide is liberated from the bicarbonate of soda. There are three classes of baking powders known to commerce, viz., the cream of tartar baking powders, the phosphate baking powders and the alum baking powders.

The cream of tartar baking powders are composed of bicarbonate of soda and cream of tartar (bitartrate of potassium), mixed with starch as a filler. The soda and cream of tartar are combined in such proportions that when united in the presence of water, in the process of cooking, they react on each other and free the carbon dioxide, which leavens the bread.

In the phosphate powders the active agent is the phosphate of calcium, which, unites with the bicarbonate of soda and releases the dioxide of carbon, the leavening agent.

The alum powders, as they do not differ from the cream of tartar powders in the main essential feature of a baking powder, to-wit, the releasing of the carbon dioxide from the bicarbonate of soda, but merely in the non-essential mode of liberating the gas, do not differ from each other essentially. In the phosphate alum powders phosphate of

calcium is used to aid in liberating from the bicarbonate of soda the gas, the leavening agent, the essential thing.

The straight alum baking powders are composed of bicarbonate of soda and a double sulphate salt of sodium and aluminum, which technically is not alum at all, but is popularly called soda alum, with starch as a filler or carrier. The alum and the bicarbonate of soda are mixed in such proportions that in the cooking process the carbon dioxide is released, as a leavening agent, as in the case of the cream of tartar baking powders. The resulting products are sulphate of sodium and hydroxide (hydrate) of aluminum.

The evidence of the plaintiff in error offered on behalf of the defendant tended to show that none of the products left in the food cooked with alum baking powder are at all injurious to the human system.

The evidence shows that the trade in alum baking powders, as a trade, has given entire satisfaction to the people. Alum baking powders are nearly as standard an article as flour or sugar. They are to be found upon the shelves of practically every grocery store in the United States, being first introduced about 1870. In spite of the fiercest opposition and the most hostile rivalry on the part of the manufacturers of cream of tartar powders, who, the record shows, have used every effort to prejudice the public mind by all manner of false advertisements and representations, the trade has rapidly expanded until it has now reached vast proportions, the sales of alum baking powders in the United States, in the last year, amounting to not less than 120,000,000 pounds.

The evidence adduced on behalf of plaintiff in error also tended to show not only was the particular can of baking

powder, known as "Layton's Health Food," for the sale of which he was prosecuted, but also all alum baking powders in general, are, and always have been, healthful and wholesome adjuncts in the preparation of human food. The evidence shows conclusively that no one had ever either heard of, or had known of, a single case where the health of a single human being had been injured, or had been supposed to have been injured, by the use of alum baking powder in the preparation of food, and that the trade in alum baking powders, as a trade, prior to the passage of the Missouri law, was an honest and lawful business in a generally harmless and useful preparation used as an adjunct in the cooking of food. The manufacturers and sellers of both such powders, cream of tartar and alum, have been engaged in competition with each other in furnishing to the people from bicarbonate of soda, a leavening agent for cooking bread, cakes, etc. They differ only in the non-essential manner of freeing the gas. The trade in cream of tartar powders has been practically monopolized by the Royal Baking Powder Company, which controls the cream of tartar market. If the trade in alum baking powders shall be destroyed in the State of Missouri, by the legislation in question, the necessary effect will be to foster and increase the trade of the rival industry, and give it a practical monopoly.

Nearly all these facts, certainly those necessary to sustain the case of the plaintiff in error, are matters of such public notoriety that it is submitted the court will take judicial notice of them.

All of this evidence, when offered, was objected to by the State, as irrelevant and immaterial, in view of the stipulation signed on behalf of the plaintiff in error. The court below announced that it would not then rule upon the objection, but would receive the evidence, subject to objection, and

when the evidence was all before the court, then determine whether to admit the evidence or rule it out (pp. 14, 15), and at the conclusion of the trial in the court below, the court did rule out all the evidence offered by the plaintiff in error as irrelevant and immaterial. (pp. 665, 666.)

The court below held in effect that it made no difference how lawful might be the calling of the plaintiff in error before the passage of the law in question, nor how innocent and useful was the article in which he dealt, the legislature was the sole judge of its powers, when it assumed to exercise its police power in the matter of food, and that, in the exercise of such powers, it might prohibit any article of food: that the court could not consider or weigh any evidence to show that baking powders are wholesome and useful adjuncts of food, and that the trade in them is a wholesome, honest and useful trade; nor could the court even take judicial cognizance of such fact.

The constitutional rights invoked by the plaintiff in error were set up by the instructions prayed for in the court below (pp. 661–665), all of which instructions the court below refused to hold, and found the plaintiff in error guilty and assessed a fine of $100 and costs (p. 3.) Upon appeal to the Supreme Court of the State of Missouri, the highest court in the state, where the unconstitutionality of the statute was pressed upon the court, as being obnoxious to the Fourteenth Amendment to the Federal Constitution (pp. 682, 696, 697, 698, 727), that court, in February, 1901, upheld the state statute, overruled the exceptions, and affirmed the judgment of the court below in all things. (p. 714.) Layton then sued out a writ of error, which was duly allowed in due form by the presiding justice of Division number Two of the Supreme Court of the State of Missouri, and thus the judgment is brought to this court for review.

Assignment of Errors.

1. That the Missouri statute is in contravention of the Fourteenth Article of Amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law.

2. That the Supreme Court of Missouri erred in its ruling that the said statute of the State of Missouri, approved May 11, 1899, does not conflict with the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Missouri erred in not holding that the said state statute was in violation of the constitutional guaranties contained in the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

The questions involved relate to the natural,inalienable rights of the citizen to follow a common occupation of life. The liberty of the plaintiff in error, which is imperiled, is not the mere physical restraint of his person, but is that larger liberty—to follow one of the ordinary callings of life as a citizen of the United States. "It is a postulate, as respects rights of property, that the right to pursue one's happiness without restrictions established by the police power—such pursuit of happiness to be by carrying on some means of livelihood by labor of any kind—is a principle of American liberty. The right to choose one's calling is an essential part of liberty, and a calling when chosen is a man's property, says Mr. Justice Bradley, dissenting in the Slaughter House cases.[1]

([1]Russell, Police Powers of the State.)

It is respectfully, but earnestly, submitted, that the time has come when this court must take a step in advance of any heretofore taken, and protect the citizen in his person, and in his property, from state enactments improvidently adopted, the effect of which are to deprive or take away from the citizen a natural, inalienable right.

For, as said by Mr. Justice Matthews, speaking for this court in *Hurtado* v. *California*, 101 U. S., 516:

"The limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities as well against the power of numbers as against the violence of public agents transcending the limits of law-

ful authority, even when acting in the name, and wielding the force of the government." (p. 536.)

The question involved is not one of regulation, but of absolute prohibition of a business lawful in its character, furnishing in immense quantities a harmless product, efficient in performing its function, the trade in which has grown to majestic proportions. The sales of alum baking powder in the last year throughout the United States amounted to no less than 120,000,000 pounds. Neither is the statute in question based on preventing deception of the public, by imitation of one article by another. The Supreme Court of the State of Missouri so construed the statute in question, in the case at bar. (p. 724.)

Alum baking powders are to be found upon the shelves of practically every grocery store in the United States, the result of a trade which has been established for twenty-five years in a well recognized article of commerce, the innocent nature of which has been so well demonstrated by experience that it has had almost universal acceptance, and has been used and approved by a majority of the people as a common household article. These baking powders have stood the test of experience for thirty years or more. Though, perhaps, not so universally used as common table salt, these powders stand upon very much the same footing as a wholesome adjunct of the cooking process. It is a matter of common notoriety, of common daily experience of the people, that alum baking powders are in the main wholesome and useful. Their enormous consumption, after years of experience, and their acceptance by the people, after such experience, demonstrate this fact conclusively. While it is true that so called scientific men can be found, who will go upon the stand and testify in opposition to these powders, it is significant that such opposition is generally stimulated

by retainers from the principal trader in rival baking powders. Such is the record in the case at bar. Furthermore, nothing seems to be so good that it does not escape condemnation of some so called scientific men. Some of them condemn the use of common table salt, attributing to its use most of the ills of mankind. Others condemn the use of bread made from wheat, attributing to its large consumption the largely prevalent diseases of diabetes and constipation. These illustrations might be extended indefinitely, but we can safely waive aside all of these objections against the use of table salt as of no weight against the lessons of experience, and the lesson is the same in the case of alum baking powders as in the case of table salt. After having been used for thirty years or more, 120,000,000 pounds of them would not have been sold in one year if they were not wholesome and useful. The business of manufacturing and selling them, was, therefore, an honest and a lawful business. Such a business was not made unlawful because parties conducting it may or do commit frauds in it, or by their want of skill or honesty may injure it. But what trade or calling has not its liabilities to fraud and abuse, and consequent injury? Flour is adulterated, and so is sugar. The illustrations might be accumulated. There is no easier or more tempting opportunity for the practice of tyranny than in the police control of occupations. Good and bad motives often combine to accomplish this kind of tyranny. The zeal of the reformer, as well as cupidity and self-interest, must alike be guarded against. Both are apt to prompt the employment of means to attain the end desired, which the constitution prohibits.

This proposition is nowhere better stated than by Prof. Tiedeman:

"It has been so often explained and stated, that the police

power must, when exerted in any direction, be confined to the imposition of those restrictions and burdens, which are necessary to promote the general welfare, in other words to prevent the infliction of a public injury, that it seems to be an unpardonable reiteration to make any further reference to it. But the principle thus enunciated is the key to every problem arising out of the exercise of police power. Applied to the question of prohibition of trades and occupations, it declares unwarranted by the constitution any law which prohibits altogether an occupation, the prosecution of which does not necessarily, and because of its unenviable character, work an injury to the public. It is not sufficient that the public sustains harm from a certain trade or employment, as it is conducted by some who are engaged in it. Nor is it sufficient that all remedies for the prevention of the evil prove defective, which fall short of total prohibition. Because many men engaged in the calling persist in so conducting the business that the public suffer, and their actions cannot otherwise be effectually controlled is no justification of a law which prohibits an honest man from conducting the business in such a manner as not to inflict injury upon the public. In order to prohibit the prosecution of a trade altogether, the injury to the public, which furnishes the justification for such a law, must proceed from the inherent character of the business. Where it is possible to conduct the business without harm to the public, all sorts of police regulations may be instituted, which may tend to suppress the evil. Licenses may be required, the most rigid system of police inspection may be established, and heavy penalties may be imposed for the infractions of the law, but if the business is not inherently harmful, the prosecution of it cannot rightfully be prohibited to one who will conduct the business in a proper and circumspect manner. Such an one would 'be deprived of his liberty' without due process of law.

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"Fraud is a trespass upon the rights of others, and may, therefore, always be punished. When, therefore, a business consists necessarily in the perpetration of a fraud, the business may be prohibited, although fraud furnishes no justification for the prohibition of a business, which is not necessarily fraudulent, but which only affords abundant facilities

for the commission. Thus it has been held within the constitutional limitations of the power of a state legislature to prohibit the sale of adulterated milk, even though the adulteration is made with harmless materials, such as pure water. It may be said that a perfectly *bona fide* sale may be made of adulterated milk, but the position is hardly sustainable. Adulteration is essentially fraudulent, and serves no good purpose, and the sale of the adulterated article of food may be rightfully prohibited, although it produces no unwholesome effect. Sugars are now very commonly adulterated by the use of a harmless substance called glucose. There can be no doubt of the power of the state to make the sale and manufacture of adulterated sugar a misdemeanor, but the great difficulty that is experienced in detecting and suppressing this mode of adulteration would not justify the absolute prohibition of the sale and manufacture of sugars.

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"An honest man can not be denied the privilege of conducting the business in an honest and lawful manner because dishonest men are in the habit of practicing gross and successful frauds upon those with whom they have dealings. If that were justifiable ground for abolishing any business, many important, perhaps some of the most beneficial, employments and professions could be properly prohibited. There is no profession or employment that furnishes more abundant opportunities for the practice of frauds upon defenseless victims than does the profession of the law, and that profession has its ample proportion of knaves among its votaries, although the proportion is very much smaller than is popularly supposed. But it would be idle to assert that, because of the frequency of fraudulent practices among lawyers, the state could abolish the profession and forbid the practice of the law.

* * * * *

"A still stronger ground for the total prohibition of a trade or business is when the thing offered for sale is in some way injurious or unwholesome. It is not enough that the thing may become harmful, when put to a wrong use. It must be in itself harmful, and incapable of a harmless use. Poisonous drugs are valuable when properly used, but they may work serious injuries by being improperly used, even

to the extent of destroying life. But it would hardly be claimed that, on that account, their sale could be prohibited altogether. Safeguards of every kind can be thrown around the sale of them, so that damage will not be sustained from an improper use of them, but that is the limit of the police control of the trade. * * * So, also, the sale of milk, which comes from cows fed in whole or in part upon still slops, may be prohibited, if it is true that such milk is unwholesome as human food. In the same manner a law was held to be constitutional, which prohibited the sale of illuminating oil which ignited below a certain heat. But it would be unconstitutional to prohibit altogether the sale of either of these things, if they could be employed in some other harmless and useful way. For example, the oil which was prohibited for illuminating purposes, may be very valuable and more or less harmless when used for lubricating purposes."

Tiedeman's Limitations of Police Power, p. 289 *et seq.*

The statute in question is not a statute regulating the use of alum baking powders; neither is the statute designed as an aid to prevent deception by the substitution of one article for another. While the law, in terms, forbids the use of arsenic, calomel, bismuth and ammonia, as well as alum, it is manifest that the sole purpose and object of the act was to prohibit the manufacture and sale of alum baking powders, and it was the trade in alum baking powders that was really and solely aimed at. It is probably unnecessary to suggest that neither arsenic, calomel or bismuth is ever, or has ever been, used in food, and that, as a scientific fact, they could not be so used, except with an intent to murder. They have no scientific relation to the preparation of food. And the persons who engineered this act through the Missouri legislature, appreciating that, in order to constitutionally prohibit the prosecution of a trade altogether, the injury to the public, which furnishes

the justification for such law, must proceed from the inherent character of the business, coupled alum with arsenic, bismuth and calomel. But coupling alum with arsenic will not save the act, for, as is universally known, one is a virulent poison, and the other is not, and the courts will not be misled by any such transparent device; neither can this stratagem be supplemented by the testimony of hired scientists to overcome the force and effect of the universal use of alum baking powders. Again:

> It is made unlawful for any person to manufacture or sell * * * any article * * * to be used in the preparation of food, in which * * * there is any * * * alum.

Therefore, the manufacture of any baking powder in which is contained any alum, no matter how infinitesimal in quantity, is prohibited. Ostensibly this act is in aid of the public health, but if it is not in aid of the public health, and if the statute, on being subjected to the ordinary tests, shall fail to meet the constitutional objections levelled against it, the pretense the act affects will be unavailing. In whatever language legislation may be framed, its purpose must be determined by its natural and reasonable effect.[1]

The act is so general in its terms that the use of the slightest particle of alum in the manufacture of a baking powder would constitute the offense, even though such use was wholly harmless. It surely will be no answer to say that the legislature is the sole judge of what is a lawful calling, and that if it professedly acts in the exercise of its police powers, however injurious and arbitrary may be the enactment, and whatever discrimination it may make between citizens, it is the conclusive judge of its own powers, and

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[1] Henderson v. Mayor, 92 U. S., 239.
Morgan S. S. Co. v. Louisiana, 118 U. S., 465.

that, therefore, the court has no power at all to inquire into the subject; and, inasmuch as it was admitted on the trial in the court below that alum was in the powder sold, the offense was complete and within the power of the state to punish.

That any man should hold his life, liberty and property subject to the edict of any man or set of men—legislators or others—is so monstrous a proposition that it must be sustained by unquestioned authority. There is no such authority.

The courts can at all times examine into the reasonableness of an act of the legislature, ascertain its true intent, effect and purpose, and if it, in fact, unreasonably abridges the fundamental rights of any citizen, declare the law void, whatever may be the pretense under which the law was passed. It is not only their right but their duty to do so. There is nothing magical in the words, "police power," to exclude the courts from an examination into the true construction and the real purpose and effect of any and every act of the legislature.

"The legislature cannot preclude the appropriate use of things innocent in themselves by stigmatizing them as poisonous, nor will a legislative declaration render that a nuisance which is not such within the legal definition of the term and according to the common experience of life and trade." [1]

As has been said by a learned author:

"Laws passed depriving one class of citizens of their rights for the purpose of benefiting another class are of the most tyrannical and pernicious character, and are usually enacted under some specious pretext of protecting the public health, promoting the general welfare, and always in virtue of the police power of the government. If it is competent

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[1] Hare on Const., Vol. 2, page 772.

for the legislature in the exercise of its police power, to prohibit or suppress the manufacture or production of any particular production of food, trade or commerce on the pretense that it is injurious to the public health, morals or general welfare of the people, where there is no apparent cause or reason for such action, and the courts are not allowed to question the assumption, it is a monstrous power, subversive of our liberties and of all our cherished rights under the constitution. It practically nullifies the bill of rights and the principles enunciated in the Declaration of Independence, depriving us of our property, liberty and pursuit of happiness. Under this decision, it would seem that to prevent the court from inquiring into the validity of such enactment, however unwarranted, it is only necessary that the title should express an object of police regulation, and that the act itself should be carefully drawn to conceal its real purpose. If so drawn it must under this decision be held a proper exercise of the police power and not in conflict with any provision of the constitution, however flagrantly it might affect private rights and property."

"To illustrate, let us apply the doctrine here advanced to two springs of mineral water located in the State of Wisconsin. One of them, the Bethesda, is well known and in extensive use in this country, yielding a princely income to its owners, a syndicate of capitalists and politicians capable of widely influencing the legislation of the state. The other spring, known as the Delavan Lithia, is just rising into public notice and prominence, possessed of characteristics that may enable it in time to supplant the popularity of the Bethesda, and thereby become a serious competitor for the supply of the wants of the public. The owners of both springs are engaged in bottling, impregnating and selling their waters. Let us suppose that the able syndicate of the Bethesda, seeing the danger which might threaten, should apply to the legislature of Wisconsin for a law prohibiting the bottling, carbonizing or selling of the Delavan Lithia water, or the having it in possession with intent to sell, making the violation of such statute a misdemeanor punishable by fine and imprisonment; and in order to bring it effectually within the principle of the oleomargarine decision, we will suppose that the law was entitled, 'An Act for the protection

of public health, and to prevent adulteration of minerla waters, and fraud in the sale thereof;' and the legislature should comply with their request and enact the proposed statute. A conviction under such a statute would in all respects resemble the present case and would be no more flagrantly in violation of the constitution."

This author continues:

"The fact that the Delevan Lithia water is not injurious to the public health, but on the other hand, entirely wholesome, promotive of health, and a powerful remedial agent, could form no ground for setting it aside as in conflict with the constitution, notwithstanding the manifest and openly avowed object of procuring its passage was to benefit the Bethesda syndicate, and prevent a diminution of their revenues by competition. If such is the proper construction of the police power, it would seem that our constitutional provisions for preserving our rights and property are of little avail for that purpose against it.

"To carry this doctrine to its legitimate conclusion, let us suppose that the legislature of the State of New York could be induced to pass an act with the pretentious title that it was for the preservation of the public health, etc., providing that the owners of Congress Spring should no longer bottle or dispose of the waters thereof, and that to have it in possession in bottles, with intent to sell it for use as a beverage, should be a crime, subjecting the owners to fine and imprisonment, would not the principle contended for extend to such a case and forbid the court from inquiring into its validity, or whether it was in conflict with the Fourteenth Amendment of the Constitution, for the reason that it was a proper police regulation for the public health?"

These authorities clearly establish in reference to the acts of the legislature purporting to be passed in the exercise of its general police powers, that if the true intent and purpose of the act is, not to protect the health, morals, and welfare of the public, but to foster one industry by destroying another lawful competing one, the law is void, and that it is the duty of the court to examine into all the facts of the case and to ascertain from the evidence, applying the proper

tests, what is the true intent of the law, and that the courts cannot be shut off from such inquiry by any mere declaration of the lawmakers, either in the preamble of the law or in its body, as to their true intent.

As above suggested, the Supreme Court of Missouri, has held that the act in question was not leveled at preventing deception, nor at preventing the imitation of an article by another, and, therefore, the reasoning in the celebrated case of the *People* v. *Marx*, 99 N. Y., 377, 387, is peculiarly applicable.

In the *Marx* case, the statute was held to be leveled at the absolute prohibition of the manufacture of oleomargarine. In the case at bar the statute is leveled at the absolute prohibition of the manufacture of alum baking powder, and in the *Marx* case, the Court of Appeals of New York, said:

"It appears to us quite clear that the object and effect of the enactment under consideration was not to supplement the existing provisions against fraud and deception by means of imitation of dairy butter, but to take a further and bolder step, and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products, against the competition of cheaper substances capable of being applied to the same uses, as articles of food.

"The learned counsel for the respondent frankly meets this view and claims in his points, as he did orally, upon the argument, that even if it were certain that the sole object of the enactment was to protect the dairy industry in this state against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the legislature. This we think is the real question in the case."

"* * * No proposition," says Rapallo, J., "is now more firmly settled than that it is one of the fundamental

rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. *Live Stock Ass'n* v. *The Crescent City, etc.*, 1 Abb. (U. S.) 398, *Slaughter House Cases*, 16 Wall., 106; *Corfield* v. *Coryell*, 4 Wash., C. C., 380; *Matter of Jacobs*, 98 N. Y., 98. The term 'liberty,' as protected by the constitution is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the employment of faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of Andrew, J., in *Bertholf* v. *O'Reilly*, 74 N. Y., 515, the right to liberty embraces the right of man 'to exercise his faculties and to follow a lawful avocation for the support of life,' and as expressed by Earl, J., *in re. Jacobs*, 'one may be deprived of his liberty, and his constitutional right thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.'

"Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race?

"Measures of this kind are dangerous, even to their promoters. If the argument of respondent in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal

rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them.

"Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries lawful in other respects in order to protect another class against competition. We can not doubt that such legislation is violative of the letter, as well of the spirit, of the constitutional provisions before referred to, nor that such is the character of the enactment under which the appellant was convicted."

The statute under consideration in the *Marx* case was held to be unconstitutional, for the reason that the prohibition was not confined to unwholesome or simulated substances, but absolutely prohibited the manufacture or sale of any compound designed to be used as a substitute for butter or cheese, however wholesome or valuable, or however openly and fairly the character of the substance might be avowed or published; that the act could not, therefore, be regarded as a health law, nor as intended to prevent deception by the sale of a simulated article as genuine; and stress was laid in the opinion upon the fact that the prohibition was not of the manufacture or sale of an article designed as an *imitation* of dairy butter, but of an article designed to take the place of dairy butter, however dissimilar in color or appearance the artificial product might be to ordinary dairy butter.

So here, the prohibition is upon the manufacture of any preparation into which alum may have entered, however openly done, or infinitesimal the quantity used. The Supreme Court of Missouri has held, in express terms, that the statute in question was not levelled at the imitation of one article by another, nor at preventing deception of the public. (pp. 723, 724.)

The title of the act, if it has any legitimate purpose,

shows conclusively that it was passed solely to prevent the use of "unhealthy chemicals or substances in the preparation or manufacture of any article used, or to be used, in the preparation of food." If it cannot be supported on the ground of the protection of public health, it cannot be supported at all. The fact that while the ostensible object of the law was to protect the health of the people against the use of unhealthy chemical substances in the preparation of food, the law classes alum with certain virulent poisons, as arsenic, calomel and bismuth, which never were and never could be used in the preparation of food, places beyond the range of doubt the conclusion drawn from the other evidence that the protection of the public health was a mere pretense to deprive thousands of their lawful livelihood that a single corporation might be enriched. It is a fundamental proposition of law needing no citation of authorities to support it, that a statute is like any other writing in the matter of its construction, and that we can look to its terms to ascertain, in the light of the evidence, its true purport and meaning.

The Marx case but followed the well known Jacobs case,[1] in which "An Act to improve the public health by prohibiting the manufacture of cigars and preparations of tobacco in any form in tenement houses in certain cases," was held not within the police power, and unconstitutional.

Jacobs lived in a flat of four stories, with seven rooms on each floor. He occupied with his family one of the floors, and used one of the rooms as his workshop for preparing tobacco and making the cigars, but there was no smell of tobacco in any part of the building, except in that room. He was arrested under that law, and brought a

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[1] 98 N. Y., 98.

writ of habeas corpus for his discharge, which was finally heard and decided by the Court of Appeals, and, in giving their opinion, the court said:

"Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared, and enforce the supreme law."

And, subsequently, the Court of Appeals of New York compendiously treated the question of invasion of the citizen's rights by legislation of this character in the following language:

"It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late—a kind which is meant to protect some in the community against the fair, free and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them, or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields. By the provisions of this act a man

owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed by such legislation. It is certainly lawful to sell (as in this instance) coffee. It is an article of food, and is now almost one of the necessaries of life to a large number of people. A person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the defendant in this case; and that, while his profits on the same amount of coffee sold would be smaller than if he gave no present, yet, by the growth of his trade, his income at the end of the year would be more than by the old method. This statute, if valid, steps in to prevent his adopting such a course to procure trade, and from it to secure an income and livelihood for himself and family. He is thus restrained in the free enjoyment of his faculties, which he ought to have the right and liberty to use in the way of creating or adopting plans for the increase and growth of his trade, business or occupation, unless such restraint is necessary for the common welfare. This law interferes with the free sale of food; for the condition is imposed that no one shall sell food, and at the same time, and as a part of the transaction, give away any other thing. It is not material if, by reason of the prohibition, the owner's sales of food are greatly cut down, and his ability to support his family thereby, perhaps, largely decreased. If the law is valid, the fact of its existence is a complete answer to the complaints of the owner of food that his liberty to sell his property and his chance to make a livelihood are very greatly impaired. It cannot be truthfully maintained that this litigation does not seriously infringe upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner, or that it does not, to some extent, at least, deprive a person of his property by curtailing his power of sale; and unless this infringement and deprivation are reasonably necessary for the common welfare or may be said to fairly tend in that direction or to that result, the legislation is invalid as plainly violative of the constitutional provisions under discussion." (*People* v. *Gillson*, 109 N. Y., 389–399.)

Again, the Court of Appeals of New York, in *People ex rel. Tyroler* v. *Warden of Prison*, 157 N. Y., 116, 131, announced the rule for which we contend, in the following words:

"Nor can the contention be tolerated that because there have been, in times past, dishonest persons engaged in the ticket brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, therefore the legislature can deprive every citizen engaged therein of the 'liberty' to further conduct such business. Stringent rules undoubtedly may be enacted to punish those who are guilty of dishonest practices in the conduct of such a business and the machinery of the law put in motion for its rigorous enforcement; but to cut up, root and branch, a business that may be honestly conducted to the convenience of the public, and the profit of the persons engaged in it, is beyond legislative power.

"If the law were otherwise, no trade, business or profession could escape destruction at the hands of the legislature if a situation should arise that would stimulate it to exercise its power, for in every field of endeavor can be found men that seek profit by fraudulent processes. Transportation tickets have been forged, it is said, so have notes, checks and bank bills. Railroad companies are no more bound to honor forged tickets than the alleged maker of a forged note is bound to pay it. An innocent person who suffers by parting with his money on a forged ticket has his remedy against the vendor just the same as has the bank that discounts a forged note. Such instances might be multiplied, but it would serve no good purpose, for it is well known that no business can be suggested through which innocent parties may not be occasionally victimized. But because of that fact, honest men cannot be prevented from engaging in their chosen occupations."

The distinction between regulation, designed to prevent deception and fraud upon the public, and absolute prohibition of legitimate business, and the reasons why the one will be upheld, and the other condemned, are clearly stated in a recent opinion of the Court of Appeals of New York, in which that court, speaking through Mr. Justice Cullen, said:

"This action is brought to recover a penalty for the violation of Section 27 of the agricultural law (Laws of 1893, C. 338), as amended by Chapter 534 of the Laws of 1900. The provisions of that section which it is alleged the defendant violated are as follows: 'No person shall sell, offer or expose for sale, any butter or other dairy products containing a preservative, but this shall not be construed to prohibit the use of salt in butter or cheese, or spirituous liquors in club or other fancy cheese or sugar in condensed milk. No person or persons, firm, association or corporation shall induce or attempt to induce any person or persons to violate any of the provisions of the agricultural law. Any person, firm, association or corporation selling, offering or advertising for sale any substance, preparation or matter for use in violation of the provisions of the agricultural law shall be guilty of a violation of this act.' The complaint merely follows the statutes, and alleges that the defendant advertised for sale a preservative called 'preservaline' for use with butter, 'which was neither salt used in butter or cheese, sugar to be used in milk, nor liquor to be used in club or fancy cheese,' with intent that the said preservative should be used in butter to be offered and exposed for sale. The defendant demurred to the complaint, claiming that the statutory enactment quoted was unconstitutional and void, and in this contention he has been upheld by the special term of the appellate division.

We think the disposition of this case by the courts below was correct. It is not possible to define accurately the limits of the police power, the exercise of which is vested in the legislature, nor have the courts, as a rule, essayed the task, further than to state in very general terms the nature and object of such power. Still, the power has its limitations, and those limitations have been to a large extent determined by the process of exclusion and inclusion, as the courts have upheld particular cases of legislation as valid exercise of the power, and in other cases have declared the legislation void. In *People* v. *Marx*, 99 N. Y., 377; 2 N. E., 29; 52 Am. Rep., 34, a statute absolutely prohibiting the manufacture and sale of oleomargarine or any compound as a substitute for butter and cheese was held void. The statute, having been subsequently amended so as to prohibit the manufacture or sale of any article so compounded as to

imitate butter, was upheld in *People* v. *Arensburg*, 105 N. Y., 123; 11 N. E., 277; 59 Am. Rep., 483, as valid legislation to prevent fraud on purchasers and consumers. In *People* v. *Kilber*, 106 N. Y., 321; 12 N. E., 795, a statute defining what should be deemed unwholesome or adulterated milk, and prohibiting its sale, was held constitutional. In *People* v. *Girard*, 145 N. Y., 105; 39 N. E., 823; 45 Am. St. Rep., 595, a statute forbidding the manufacture or sale of vinegar containing any artificial coloring matter was also held valid. From these cases the following propositions may be adduced: (1) That the legislature cannot forbid or wholly prevent the sale of a wholesome article of food. (2) That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well known article in common use, and thus imposing upon consumers or purchasers, is valid. (3) That, in the interest of public health, the legislature may declare articles of food not complying with a specified standard unwholesome, and forbid their sale. Though these principles, like most legal principles, are true only within limits, there would not seem much chance of conflict in their practical application, except between the first and last. In the first of the Milk Cases (*People* v. *Cipperly*, 101 N. Y., 634; 4 N. E., 107, decided upon opinion of Learned, P. J., in 37 Hun, 319) it was held that the statutory declaration of what was wholesome milk was conclusive, and the defendant was not allowed to show in defense that the milk sold by him was in fact unadulterated and not unwholesome. The first Oleomargarine Case can be differentiated from this on the ground that the statute forbade its sale as a substitute to take the place of butter, and not as an unwholesome article of food. Still, that distinction is narrow, and I imagine that the sale and consumption of a well known article of food, or a product conclusively shown to be wholesome, could not be forbidden by the legislature, even though it assumed to enact the law in the interest of public health. The limits of the police power must necessarily depend in many instances on the common knowledge of the times. An enactment of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal, to be valid must be within reasonable limits, and not of such a character as to practically prohibit the manufacture or sale of that which,

as a matter of common knowledge, is good and wholesome. The statute before us cannot be justified as an exercise of power to prevent fraud or imposition on buyers and consumers. Doubtless the legislature could provide that, where butter contained any preservative, except salt or sugar, the package should be clearly marked with a label stating such fact; and it might require any notice adapted to informing the public of the nature and treatment of the article offered for sale. This it has not done, but it has absolutely forbidden the sale. Nor is the legislation similar to that before the court in the Vinegar case. There there was no prohibition of vinegar produced from other materials than cider. The forbidden thing was the use of artificial coloring matter, which was not a necessary ingredient of the article produced, but served the sole purpose of preventing the consumer distinguishing between the different kinds of vinegar. In the present case the object of the forbidden article used is not to practice any deception, but to prevent decay in a product which, without the presence of some foreign substance, naturally becomes unfit for use in a very short period. The effect, therefore, of the statute is to prohibit the preservation of dairy products, except by salt in butter and cheese, and sugar in condensed milk, and their sale, no matter how harmless the ingredients used for the purpose may be, and no matter how efficiently they attain their purpose.

"It is sought, however, to uphold this statute under the principle of the Milk cases, on the theory that it is a legislative determination that preservatives other than salt and sugar are unwholesome adulterations of dairy products. As pointed out by the learned courts below, there is no legislative declaration to that effect. Passing, however, that consideration, there is a more serious difficulty in the way of such a course. If the statute had provided that the admixture of any substance with dairy products other than salt or sugar should be deemed an adulteration, and declared such dairy product when so adulterated unwholesome, the case would resemble the Milk case, and the question would be presented whether such far-reaching restrictions could be upheld as reasonable regulations in favor of public health. As to that question, we express no opinion. But this provision of the statute is not aimed at adultera-

tions. I cannot find in the agricultural law any general prohibition against adulterations in butter and cheese, although there is an express provision to that effect in the case of milk. Section 26 seems to forbid the use of acids or other deleterious substances only in the case of imitation butter. Though, if I err in this, and the application of the section be general, the provision under review is unnecessary so far as public health is involved. Section 407 of the Penal Code forbids the sale of adulterated food only (except in certain specified cases) when made without disclosing or informing the purchaser of the adulteration. It will be seen, therefore, that the sale of adulterated butter or cheese is not necessarily an offense, except so far as made such by the statutory enactment under review. That enactment does not make the introduction of a foreign substance an adulteration, nor an adulteration illegal, except in the case of a preservative. How, then, can it be said that the statute is intended to prevent adulteration, or the introduction of a foreign substance into butter or cheese, when the sole test of criminality under it is that the substance is introduced for the object or with the effect of preserving butter or cheese? If the foreign substance has not this effect, no matter how deleterious it may be, the use of it does not violate this provision. It is plain, therefore, that this statute is solely aimed at the preservation of dairy products by the use of other substances than salt, sugar and spirituous liquor. Why the use of salt is forbidden in milk, sugar in butter and cheese, and particularly why that of liquor is permitted in club or fancy cheese, and forbidden in other cheese, it is difficult to understand on the theory that its object was the protection of the public health. The preservation of food and the arrest of its tendency to decay is certainly a proper and lawful object in itself. It is a work in which man has been engaged, to some extent, from earliest history. It is the subject of large industries in this country, and the products of those industries are generally used by the community, and are lawful subjects of manufacture and sale. The industry has grown to an enormous extent. These are matters of common knowledge. There is doubtless in the prosecution of these industries danger of adulteration, and of the use of processes injurious to public

health. The regulation of these subjects for the protection of the public health, and the prevention of imposition on consumers, is within the power of the legislature, and the propriety of its exercise cannot be questioned. But, while it may regulate, the legislature may not destroy the industry; and that is not a valid regulation which, in dealing with the means of preserving food, makes the preservation of food itself an unlawful act. Ingredients or processes may be prohibited as unwholesome or causing deception, but not solely because they preserve." *People* v. *Biesecker*, 169 N. Y., 53, decided December 10, 1901.

The promoters of legislation of the character of the Missouri act usually seek to sustain it upon the authority of *Powell* v. *Pennsylvania*, 127 U. S., 678, and *Plumley* v. *Massachusetts*, 155 U. S., 461, but this is a misapprehension. Both the *Powell* and *Plumley* cases grew out of statutes designed to prevent fraud and deception, and this court sustained those statutes on that precise ground.

The Supreme Court of Missouri has construed the statute in question, in the case at bar, and held that the statute was not designed to prevent fraud and deception.

Furthermore, it is respectfully submitted, the *Plumley* case has been, by this court, in effect, overruled.[1]

We have, then, the Supreme Court of the State of Missouri holding in terms, in the case at bar, that the statute in question was not designed to prevent fraud, nor based upon the idea of imitation of one article by another, and the question, therefore, is, can a legislature strike down a business lawful in its character, and which produces an article of almost universal consumption throughout the length and breadth of the land, harmless in its effects, and which furnishes an efficient substitute for a higher priced article?

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[1] Schollenberger v. Pennsylvania, 171 U. S., 1.
Collins v. New Hampshire, 171 U. S., 30.

And, in this connection, it is to be remembered that this court said, in the *Powell* case:

"The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privileges of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."

If the opinion of the Supreme Court of Missouri is sound it follows that every citizen engaged in carrying on a business or occupation that may compete with another, is subject to the will of his rival, for all that is necessary is to get the legislature of a state to denounce a given article as injurious to health, irrespective of its natural and inherent qualities and characteristics, and although it may, as a matter of fact, be not deleterious to the public health, and fortify such enactment by the testimony of hired so-called scientists, and on this showing, and regardless of how thoroughly the testimony of these so-called scientists may be overcome by the living, breathing evidence of human experience, the courts, we are told, must hold that in view of the conflict of testimony, the determination of the legislature is final. But this cannot be the law, for, if it were, no man but holds his business and occupation at the mere pleasure of his more powerful and wealthy rival. The true test is, as stated by Prof. Tiedeman, "in order to prohibit the prosecution altogether, the injury to the public, which furnishes the justification for such a law, must proceed from the inherent character of the business."

"If it is only necessary for the legislature to pronounce a calling injurious to the public in order to justify its prohibition, there is no limit to the police power of the government. Constitutional restrictions would exert no greater

influence than disorganized public opinion, and absolutism, monarchical, aristocratic or democratic, according to the circumstances, would be the corner stone of such a government, at least in theory. The recognition of the rights of the minority would be only a matter of special grace and favor."[1]

There is no question of fraud, or of deception of the public, which is sought to be guarded against by the statute in question. The bald, naked proposition is, whether or not a state can arbitrarily destroy the business and occupation of the citizen when that business and occupation is a lawful one, conducted in a proper manner, producing a harmless article of almost universal consumption, and at a lower price than is charged for the article for which it is a substitute.

Judge Cooley, speaking for the Supreme Court of Michigan, in *People* v. *Hurlburt*, 24 Mich., 44, after observing that some things were too plain to be written, said:

"Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; it consists in civil and political rights which are absolutely guaranteed, assured and guarded; in one's liberties as a man and a citizen—his right to vote, his right to hold office, his right to worship God according to the dictates of his conscience, his equality with all others who are his fellow citizens; all these guarded and protected and not held at the mercy and discretion of any one man or any popular majority. Story Miscellaneous Writings, 620. If these are not now the absolute rights of the people of Michigan, they may be allowed more liberty of action and more privileges, but they are little nearer to constitutional freedom than Europe was when an imperial city sent out consuls to govern it."

Now, if the statute in the case at bar was not designed to prevent fraud or deception (and this court will follow the construction of the Supreme Court of Missouri in this respect)

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[1] Tiedeman State and Federal Control of Persons and Property, p. 521

it follows, that the only question is: Can the State of Missouri absolutely destroy a lawful business and thus deprive the citizen of a natural right to follow a lawful occupation? It is manifest, from our common knowledge and experience, that alum baking power is not inherently of a character to injure the public health, or the public morals, or the public comfort and safety. The natural attributes and tendencies of alum cannot be changed by putting the article in a state statute in company with arsenic, and inasmuch as the prohibition upon its use is complete and absolute, not only is the purpose of the act made manifest, but the exceptional character of the legislation is made conspicuous. Unless it can be made to appear to the courts (and without the aid of the rival industry's hired scientists), that any and every use of alum in baking powder works an evil to the public the statute is arbitrary; is an act without reason or justification, a mere exercise of power, of arbitrary selection of an industry to be destroyed; and such an exhibition of power, to be sustained and upheld, must spring from overpowering necessity, and the burden is upon the state to show this necessity. As was said by this court in *Chy Lung* v. *Freeman*, 92 U. S., 275:

"Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."

And in *Mugler* v. *Kansas*, 123 U. S., 623, 661, Mr. Justice Harlan used the following language, so often quoted:

"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

As said by Mr. Justice Brown, in *Lawton* v. *Steele*, 152 U. S., 133, 137:

"To justify the state in thus interposing its authority, in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

And as was said by Mr. Justice Peckham, in *Allgeyer* v. *Louisiana*, 165 U. S., 578:

"The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means not only the right of the citizens to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

It was said by Mr. Justice Bradley, in *Butchers' Union Company* v. *Crescent City Company*, 111 U. S., 746, 762, in the course of his concurring opinion in that case, that 'the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition 'that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' 'This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, the learned

justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of theUnited States.' And again, on page 765: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment."

But even if the act in question could fairly be assumed to have been a measure adopted by the Missouri legislature for the protection of the public health, the public morals or the public safety, it is nevertheless unconstitutional because when actually applied it is found to be in contravention of the principles heretofore discussed and destructive of the rights and liberties of the citizen. To repeat the language of this court in *Boyd* v. *United States*, 116 U. S., 616:

"It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it on a first presentation from noticing objections which become developed by time and the practical application of the objectionable law." (p. 635.)

Conclusion.

The act of the State of Missouri should be declared unconstitutional, because it interferes with the liberty of the citizen guaranteed by the Fourteenth Article of Amendment to the Constitution of the United States.

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